

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
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| Implementation of Section 309(j) |) | |
| of the Communications Act - |) | PP Docket No. 93-253 |
| Competitive Bidding |) | |
| |) | |
| Amendment of the Commission's |) | |
| Cellular PCS Cross-Ownership Rule |) | GN Docket No. 90-314 |
| |) | |
| Implementation of Sections 3(n) and 332 |) | |
| of the Communications Act |) | GN Docket No. 93-252 |
| Regulatory Treatment of Mobile Services |) | |

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COMMENTS OF OMNIPOINT CORPORATION

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Introduction And Summary

Omnipoint Corporation ("Omnipoint") files these comments in response to the Commission's Further Notice of Proposed Rulemaking . FCC 95-263, released June 23, 1995 ("FNPRM"). The Adarand¹ decision has imposed upon the Commission difficult choices. Omnipoint supports the Commission's effort to reduce legal uncertainty. However, Omnipoint is extremely concerned about the Commission's proposal to allow all entrepreneurs (or even all small businesses) to qualify using the 49% equity exception.² If adopted, such a scheme would undermine the very purpose of designating the C Block as an "entrepreneur's band" by permitting large, otherwise non-qualifying entities to (1) "front" applicants, (2) anoint a winner in any given market after the short-form filing deadline, but before the auction ends, or (3) demand 49% of a

¹ Adarand Constructors, Inc. v. Pena, 63 U.S.L.W. 4523 (U.S., June 12, 1995) ("Adarand").

² See FNPRM, Appendix A, Proposed Rules, 47 C.F.R. § 24.709(b)(6).

licensee's equity post-auction in exchange for roaming rights, brand name rights, volume purchase discounts, and other concessions. For entrepreneurs who relied on the 25% equity limit to contain investor control, adoption of a universal 49% equity exception would shatter the balance of interests under which they have operated, and could destroy the viability of these existing independent entrepreneurs. Omnipoint recommends that the Commission either (1) justify the 49% exception only for minorities and women under the "strict scrutiny" standard or (2) eliminate the 49% exception entirely and level the playing field on this ownership issue by treating every applicant equally under the 25% exception.

Because the Commission inevitably must adopt some changes to its rules, Omnipoint also regrettably concludes that the Commission should set the date of the short-form filings for a reasonable period of time (for example, at least sixty to ninety days) after issuance of the order in this proceeding to provide all entities with enough time to change their business plans and corporate structures accordingly. Omnipoint believes the Commission should focus on minimizing delay to the date of issuance of C Band licenses, rather than the current focus on minimizing delay of the auction filing dates. Rushing toward a filing deadline despite enormous rule changes significantly raises the probability that legal challenges will increase the real delay. Instead, if the Commission sets a rational schedule and rulemaking that will withstand legal challenges, this brief period of reasoned adjustment to the changed auction rules will actually shorten the date on which the C Band licenses are issued.

As a way to speed up the end result, *i.e.*, issuing viable Block C licenses, the Commission could use the 60 to 90 day period to refine the auction bidding rules regarding stages, activity, minimum bid increments, etc. If done properly, the combination of equitable 25% non-qualifying investor ownership limits, a realistic and legally sound timetable for filing, and improved bidding procedures should result in no delay to the actual issuance of licenses.

Discussion

I. The 25% Equity Exception Adequately Balanced The Need For Capital And The Prevention Of "Fronts."

In setting aside the Block C and F licenses for entrepreneurs, the Commission's overarching intent was to design a license allocation method that provided for competitive bidding between smaller entities (including small businesses, minorities, and women) and excluded large companies from competing for these licenses. Fifth Report and Order, 9 FCC Rcd. 5532, 5584-88, ¶¶ 118-127 (1994). This design was needed to meet the Commission's statutory obligations to promote economic opportunities for those groups historically left out of the telecommunications field and to advance the dissemination of licenses among a wide variety of applicants. 47 U.S.C. § 309(j)(3)(B). On the basis of the record before it, the Commission specifically determined that, to achieve these goals, it was necessary to exclude large entities from the bidding process:

We agree that small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large companies If one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business.

Fifth Report and Order, 9 FCC Rcd. at 5585, ¶ 121.

In conjunction with the band plan for entrepreneurs, the Commission's orders consistently reflected a balanced approach toward the equity and attribution limits for large, non-qualifying entities in Block C entrepreneurs. Appropriately, the Commission recognized that smaller companies rely on the resources of larger entities and, quite often, must offer minority equity positions for those large investors. On balance, however, the Commission's rules also reflected a

concern that excessive investment and control by a large entity should, at some point, disqualify the entrepreneur-applicant.³

With these principles in mind, the Commission carved out an *exception* to the attribution rules that permits a non-qualifying investor to own no more than 25% of the applicant's equity. This threshold was adopted because "the 25% limitation on equity investment interest will serve as a safeguard that the very large entities who are excluded from bidding in these blocks do not, through their investments in qualified firms, circumvent the gross revenue/total asset caps." Fifth Report and Order, 9 FCC Rcd. at 5601-02, ¶ 159 (1994) (emphasis added).

The Commission also concluded, however, that, due to racial and gender discrimination, women and minority entities faced additional and "especially acute problems" in attracting necessary capital as compared to other similarly-situated companies.⁴ To offset this discrimination, the Commission adopted an approach that permitted minority- and women-owned applicants to sell an additional 15% equity to a single large investor, thus increasing the attribution threshold for this category of applicants from 25% to 49.9%.

The 49% *exception* was specifically adopted "to address the lack of access to capital problem that our record showed women and minorities face." FNPRM at ¶ 6. When it first adopted this exception, the Commission explained, "to afford women and minority-owned businesses more flexibility in attracting financing, it is necessary to provide these entities with an

³ See, e.g., Second Report and Order, 9 FCC Rcd. 2348, 2396, ¶ 277 (1994) (FCC requires minority and women applicants to own and control at least 50.1% of the applicant); Fifth Memorandum Opinion and Order, 10 FCC Rcd. 403, 436, ¶ 59 (1994) (Commission summarizes the 25% equity exception and the 49% equity exception available only to minorities and women).

⁴ Fifth Report and Order 9 FCC Rcd. at 5602, ¶ 160.

alternative, somewhat more relaxed option regarding the attribution of revenues of passive investors." Fifth Report and Order, 9 FCC Rcd. at 5602, ¶ 160.

The Commission apparently has now decided, in the face of Adarand, that it does not wish to defend its existing minority and gender preference program in the Block C auction. See, FNPRM at ¶ 8. Yet, while it specifically identifies the 49% equity option as one adopted solely to aid minorities and women, the Commission has tentatively decided not only to retain this option, but to expand its availability to all entrepreneurs. The Commission's rationale is that, by so expanding the option, it becomes race-neutral, but still "preserv[es] many of the existing business relationships that have been formed, including those of women and minorities." Of course, the Commission's tentative decision on this matter is not mandated by the auction statute, and it may not meet the standards recently announced in Adarand.

II. The Commission Does Not Need to Expand the 49% Option.

On the basis of the record compiled earlier in this proceeding with respect to non-minority and male-owned firms, the Commission concluded that the 25% option adequately balanced the need to attract capital and avoid fronts. Simply stated, there was no reason then and no reason now to move all entities or all small businesses toward the 49% option, which, Omnipoint believes, would significantly increase the temptation to create fronts either before, during or after the auction.

The Commission's rationale for its shift in policy -- to "cause the least disruption to existing business relationships" and to enable "minority or women-owned businesses to retain their 50.1/49.9 percent equity structures..." FNPRM at ¶ 15 -- does not even address the rights of those that relied on the 25% equity exception. Any shift in the eligibility rules must be consistent with the Commission's obligation to all entrepreneurs.

Omnipoint believes that the Commission's proposed change in attribution for all applicants will have a devastating effect on the ability of the Commission's Block C band plan to promote small business opportunities and a diversity of licensees. The Commission adopted the

Block C eligibility criteria in order to allocate licenses to entities with less than \$125 million in revenues and \$500 million in assets. Expanding the 49% equity exception to all applicants (or even to all small businesses) seriously threatens that objective by allowing even the very largest companies to own 49% of any applicant/licensee. This is a radical departure from the Block C plan adopted in the Fifth Report and Order and affirmed in the Fifth Memorandum Opinion and Order. This departure aids no one but the large "investors" and promises to disenfranchise existing independent entrepreneurs from the Block C.

Minority- or women-owned entities that have already structured their plans based on the "49% option" would not be materially harmed if required to comply only with a "25% option," because all other arrangements would be kept intact. First, a change from 49% to 25% for the large investor would not affect the non-equity provisions of existing agreements, such as brand-name agreements, put rights, or roaming arrangements. Second, the change is only a negotiation between two parties (the large investor and the applicant), not four or five parties, as is the case with three 25% equity investors, a 10% institutional investor, and the control group with 15% equity. Third, while the current equity ownership would have to shift from 49%/51% to 25%/75%, the economics can be kept the same through the use of various financing mechanisms including debt, equipment and construction loans, etc. Whatever arrangements were in place for going from 49% to control after the fifth year (e.g., puts), can be used to go from 25% to control.

Clearly, such designated entities will need more than 10 business days to negotiate the new equity structure, but if all applicants have equal preferences there is no reason why an existing big company with 49% equity will switch applicants when going to 25%, given that they have already invested months negotiating all the non-equity aspects of the deal. Conversely, the proposed expansion of the 49% equity exception will probably harm minority applicants, as their potential investors could pull out of existing deals (or near-deals) in search of better ones. In fact, by opening up the 49% exception to all applicants (or all small businesses), investors would not need to partner with minority or women-owned applicants at all. Instead, the 49% investor

could seek out any entity after the filing deadline that will offer it better, more lenient, terms.

There are some recent press reports that this may already be happening.

III. The 49% Option Will Encourage The Use Of Fronts Both Pre- and Post-Auction.

Extending the 49% equity exception to all applicants is completely different from using it as a narrowly-crafted tool to help overcome the effects of discrimination. The ability of large, non-qualified companies to use any entity as a vehicle for obtaining the benefits of owning a Block C license encourages the formation of fronts either before, during or after the auction. As a practical matter, under the plan proposed in the FNPRM, the fact that every entrepreneur *could* now offer the "49% option" to large companies means that large companies will now require that, as a *minimum* condition to enter the negotiation process, applicants offer them 49% equity. In contrast, the existing 25% equity exception has allowed applicants to maintain substantial control over their own companies by balancing the interests of three 25% non-entrepreneur owners, without the imposition of a dominant 49% owner. With three 25% equity holders, no one investor will be able to exert undue control over the applicant because the other two investors will not allow it. This provides the entrepreneur with leverage and forces investors to remain as investors, and not become operators. In contrast, the 49% option poses much more risk of non-qualifying investor control because the applicant is wholly dependent on the dominant investor's financing. If there is no 25% limit, the negotiating leverage shifts entirely in favor of the large entities.

Applying a 49% option to *all* entrepreneur (or *all* small business) applicants would deliver to big investors the ultimate negotiating tool with entrepreneurs. Regardless of the Commission's rules against "fronts," the big investor contributing the preponderance of the capital for the applicant will only do so with an applicant that offers the large investor as much control of the company operations as is legally possible, through complex management agreements, brand name, put rights, royalty arrangements, investor veto rights, and *de facto* constraints on sales of equity after the lapse of the five year anti-trafficking restriction.

Undoubtedly, some will actually force conditions on entrepreneurs that step well into the gray areas regarding the limit of control, as defined by the FCC. While the FCC has stated that it will audit applicants on a case-by-case basis after the auctions, only rules that fortify entrepreneur control from the outset would benefit the objective of ensuring a diversity of licensees and participation for minorities, women and small businesses. In contrast, a 49% "option" for all small businesses would only benefit the big investors, as all entrepreneurs would be forced to meet the market's lowest common denominator, compromise on control issues, and flirt with the very limit of the law in order to attract available investors.

IV. Extending the 49% Equity Exception Undermines the Existing Deals Formed Under the 25% Equity Exception.

For prospective applicants that have already structured themselves according to the 25% equity exception, adoption of a 49% equity exception for all applicants would cause tremendous problems.

First, there is no mathematical way to simply convert an existing deal consisting of three 25% passive equity investors (or, more likely, three 25% equity investors and one 10% investor) to a structure with one 49% equity investor and 20% equity for institutional investor(s). The 49% equity exception requires the qualifying members of the entrepreneur control group to hold 30% of the total equity, while the 25% equity exception requires that the qualifying members hold only 15% total equity. To convert from the 25% to the 49% equity exception requires the entrepreneur to convince at least three or four existing investors to change their *relative* ownership without being able to offer any of the investors, except one, any offsetting benefit. It is a hollow gesture to assert that existing entrepreneurs who constructed their companies under the 25% equity structure can now obtain the "benefits" of the 49% equity exception when the only means to accomplish the transition to the 49% equity model is to radically change all equity relationships with multiple parties. Further, to suggest that such an entrepreneur has a few

business days to accomplish this and find and negotiate a deal with a 49% large investor is patently unfair.

In addition, investors will undoubtedly back out of some existing 25% deals in order to form new applicants for the 49% equity, and thus leave the original applicant structured under the 25% equity exception without adequate funding. While the Commission claims that retention of the 49% equity exception is for the benefit of existing minority and women deals, it has offered no analysis, and the record suggests none, of the impact of its rule changes on small businesses that were not eligible for this before and structured themselves accordingly. Omnipoint submits that some small businesses will be adversely affected as some of these deals (or near-deals) with investors come apart due to the newly proposed 49% exception. Given that the Commission has asserted that it will no longer pursue Block C preferences for minorities and women, FNPRM at ¶ 10, the Commission is obligated by the auction statute to ensure that its Block C rules promote, and do not harm, opportunities for all small businesses. 47 U.S.C. § 309(j)(3)(B), (4)(C) & (D).

V. **The Commission Should Either Justify the 49% Equity Exception Under Strict Scrutiny or Eliminate It, Just As It Eliminated the Affiliation Exception.**

The 49% equity exception, just like the affiliation exception,⁵ was clearly developed solely as a way to help minorities and women obtain capital. The Commission tentatively eliminated the affiliation exception on the basis of its conclusion that "it would be imprudent to extend such an exception to all entrepreneurs because to do so would frustrate the Commission's goals in establishing the entrepreneur's block -- namely, to ensure that broadband PCS will be disseminated among a wide variety of applicants and to exclude many large telecommunications companies from bidding on such blocks." FNPRM at ¶ 19. The Commission should either

⁵ 47 C.F.R. § 24.720(l)(11)(ii); FNPRM at ¶ 19.

justify both exceptions under the "strict scrutiny" standard or eliminate both of them if the Commission has determined that it cannot retain minority/women preferences in light of Adarand.

The Commission's proposed expansion of the 49% exception will not survive scrutiny either under the APA or Adarand. Adoption of the Commission's proposed 49% exception would, yet again, add legal uncertainty for potential applicants⁶ and raise the probability of the entrepreneur's band becoming a "Big Company Front Band," if not before the auction, then during or after it.

VI. The Commission Should Set the Short-Form Filing Date To Permit Enough Time For Applicants To Absorb Any Rule Changes and Avoid Legal Challenges.

As discussed above, Omnipoint strongly urges the Commission to eliminate the 49% equity exception. Regardless of what rule changes the Commission makes, and it inevitably must make some changes, Omnipoint believes that the only reasonable and legally defensible option would be to provide all prospective applicants and the market sufficient time to react to these significant rule changes, which go to the very heart of most current financing arrangements and corporate structures.

Under the circumstances, setting a short-form filing date to allow a reasonable amount of time for those applicants that relied on the 49% equity exception to change existing deals to comply with the 25% exception and talk to new investors is in the best interest of all Block C applicants. Moreover, it would greatly reduce the risk of further litigation. Regardless of the final rule changes, existing and prospective applicants that have to comply with new rules (or rules which they have never had reason to focus on) obviously have not organized themselves to

⁶ See Comments of Omnipoint Communications, Inc. (filed in response to TEC Waiver Proceeding), PP Docket No. 93-253 (filed April 3, 1995).

take full advantage of the new rules or explored alternative financing arrangements. If the Commission is committed to adopting a race-neutral set of rules, it is only fair to allow all prospective applicants to have substantially the same opportunities for financing.

Some parties have had 15 months to negotiate with investors under one set of rules. The Commission cannot possibly believe that it is anything but arbitrary and capricious to now provide only a few business days to review and take advantage of sweeping eligibility rule changes before short-forms are due. The filing deadline imposes the anti-collusion rule restriction, making it illegal to talk to other parties that have invested in applicants in overlapping markets. Thus, any investor that invests 5% or more in another applicant is eliminated as a potential investor to those applicants that are trying to adapt to the new rules. Adoption of the rules proposed in the FNPRM without providing adequate time for all entrepreneurs to adjust and talk to all potential investors on an equal footing is simply unfair and legally indefensible.

Conclusion

Omnipoint urges the Commission to ensure that its auction process is one that is legally sound, equitable to all participants, and leads to the issuance of secure Block C licenses occurs as quickly as possible. The proposed plan, while it emphasizes a rush to the filing and auction start dates, fails to address potential legal challenges and equitable concerns, and so is almost certain to result in court delays. Instead, Omnipoint urges the industry and the Commission to focus on

the timely issuance of licenses. Only viable Block C licenses will form the basis of actual entrepreneur operating businesses.

Respectfully submitted,

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